In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-521

GENERAL MOTORS CORPORATION,
Petitioner
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHRYSLER CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GENERAL MOTORS CORPORATION

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PRELIMINARY STATEMENT

Pursuant to the written consent of General Motors Corporation ("GM") and the United States, Chrysler Corporation ("Chrysler") submits this brief as *amicus curiae* in support of GM's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This brief is directed to a single constitutional issue which we respectfully urge warrants the granting of

GM's petition. Chrysler contends that the Court of Appeals' majority opinion forecloses a motor vehicle manufacturer's constitutional right to present evidence to a trial court on the determinative issue of whether, under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1391 (1970)[1] ("the Act"), a defect exists in a motor vehicle which poses an "unreasonable risk" of accident, injury and death.[2]

INTEREST OF THE AMICUS CURIAE

Chrysler is a Delaware Corporation which is a major manufacturer of motor vehicles in the United States. As a manufacturer, Chrysler is directly affected by the operations of the National Highway Traffic Safety Administration ("NHTSA" or "the agency") and particularly by the agency's investigation of safety-related defects which may involve the potential for recalling hundreds of thousands of vehicles.

In the past Chrysler has found that very rarely will a conflict arise between a motor vehicle manufacturer and NHTSA as to the need to recall vehicles and repair defects if the engineering and field information clearly establishes that significant numbers of a particular item of motor vehicle equipment are failing with resulting physical injuries or a potential for such injury. It is only when statistical projections and isolated pieces of engineering data do not agree with field information and actual operational experience that NHTSA and the manufacturer may disagree as to the need for a recall campaign. This, of course, is only natural since the agency's mandate from Congress is to work to enhance motor vehicle safety and a manufacturer, while striving to

[1] The Act was amended in 1974 in respects not material to this litigation.

[2] This issue was alluded to but was not sufficiently developed in GM's Petition for a Writ of Certiorari, p. 15 n.10.

produce a safe vehicle, does not wish to institute a multi-million dollar recall campaign affecting hundreds of thousands of vehicles if the alleged defect does not pose an "unreasonable risk" to motor vehicle safety. Manufacturers are skeptical of such marginal recall campaigns because the very act of recalling hundreds of thousands of vehicles and permitting thousands of mechanics, possessing various degrees of experience, to work on the vehicles can itself cause more vehicle problems than are corrected.

The Act as passed by Congress recognized that disputes such as those noted above would arise between NHTSA and a manufacturer. Congress, therefore, provided a two-stage investigatory process for resolving such disputes. The first stage involves an informal public meeting initiated by NHTSA wherein the manufacturer has the opportunity to present its views and evidence to support its position that a defect does not exist or does not pose an unreasonable risk to vehicle safety. The second stage involves a trial *de novo* wherein the government has the burden of proving not only that a defect exists but that it poses an "unreasonable risk" to safety. The GM case is the first instance wherein a manufacturer has availed itself of the trial *de novo* and challenged the government's evidence as to the existence of an "unreasonable risk" to safety.

Chrysler believes that the Court of Appeals has construed the Act so as to effectively eliminate a motor vehicle manufacturer's due process right to present evidence to a court, and challenge the government's evidence, concerning the crucial issue of whether a defect exists which presents an "unreasonable risk" to motor vehicle safety. Chrysler urges this Court to grant GM's petition and review the Court of Appeals' opinion in light of this Court's past decisions holding that a *per se* rule against presenting evidence on the determinative

issue addressed by a statute is an unconstitutional denial of due process.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is of critical importance to all motor vehicle manufacturers, since enforcement litigation under the Act is concentrated in the District of Columbia Circuit. The court's adoption of a *per se* rule for the determination of an unreasonable risk to motor vehicle safety precludes a manufacturer from introducing and having considered evidence bearing on the presence or absence of such a risk and effectively eliminates the manufacturer's constitutional right to challenge the informal administrative determination of a safety-related defect.

Section 152(a)(2) of the Act, 15 U.S.C.A. § 1412(a)(2) (1977 Supp.), empowers the Administrator[3] to issue recall orders only if a determination can be made that the manufacturer's vehicles contain a defect which represents an unreasonable risk of accident, injury, or death. See *House Committee on Interstate and Foreign Commerce, Report on Motor Vehicle and School Bus Safety Amendments of 1974*, H.R. REP. NO. 93-1191, 93 Cong. 2d Sess. 14. Thus, the Administrator does not have the power to order a recall of motor vehicles to correct any and all vehicle defects. See 42 Fed. Reg. 7146 (February 7, 1977) (regulations governing exemption of motor vehicles from recall on the ground that the defect is inconsequential as it relates to motor vehicle safety).

The legislative history of the Act demonstrates that Congress deliberately placed the "unreasonable risk" restriction on the power of the Administrator in recogni-

[3] The Administrator of NHTSA acts as the delegate of the Secretary of Transportation for the purpose of carrying out the requirements of the Act. 49 C.F.R. § 1.51(a) (1977).

tion of the fact that a more stringent standard would require such enormous outlays for the design and manufacture of motor vehicles that it would result in an impossible production standard. Inherent in this "unreasonable risk" standard is Congress' conclusion that the Administrator should only issue recall orders if, after a balancing of safety considerations and the cost of compliance involved in each particular situation, creditable and relevant evidence clearly establishes that society's interests are better protected by the issuance of a recall order. *United States* v. *General Motors Corp.*, 518 F.2d 420, 435 (D.C. Cir. 1975); See S. REP. No. 1301, 89 Cong. 2d Sess. 6 (1960); *Traffic Safety: Hearings on § 3005 Before the Senate Comm. on Commerce*, 89 Cong. 2d Sess. 56, 411 (1966); *cf. Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 18 n.32, 28 n.52 (D.C. Cir. *en banc*), *cert. denied*, 426 U.S. 941 (1976); *United States* v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Any such rule of reason analysis requires the careful ascertainment and review of the facts of each particular situation. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963).

In carrying out the balancing analysis noted above, the Act provides a two-stage process for reviewing all relevant information, analyzing the existing risk factors, and making a final determination as to whether a safety-related defect which poses an unreasonable risk to motor vehicle safety exists in a manufacturer's vehicles. The first stage of analysis is carried out in an extremely informal *ex parte* procedure which provides a manufacturer with no due process protection.

NHTSA's normal investigatory process begins with the agency providing the manufacturer with customer complaints the agency has received on a particular subject, any preliminary test results the agency has developed, and, finally, a request that the manufacturer comment

on the agency's information and provide the agency with all information in the manufacturer's possession concerning the subject investigation. If the manufacturer's response to NHTSA includes a determination that an unreasonable risk to motor vehicle safety does not exist in the subject vehicles, and the agency disagrees with this conclusion, the matter is normally transferred to the Administrator or Chief Counsel for review.

This review process by the Administrator or Chief Counsel may take from several weeks to a year. Moreover, this review process is entirely *ex parte* in nature, and no information developed within the agency during the review, or collected by the agency from consumers or other interested groups, is presented to the manufacturer for its analysis and comment. Thus, a significant amount of time may pass during which evidence is developed or collected by NHTSA and the manufacturer is totally unaware of this evidence and unable to analyze the evidence for its truth and veracity. Indeed, in the past NHTSA has refused to provide voluntarily such information to manufacturers upon their request or provide the information in response to a formal Freedom of Information Act request.

After NHTSA reviews all evidence available to it in an *ex parte* atmosphere, the Administrator may issue an initial determination that the manufacturer's vehicles contain a defect which poses an "unreasonable risk" to motor vehicle safety. At this juncture the Act requires that the Administrator notify the manufacturer of his findings and present all information on which his determination is based. 15 U.S.C.A. § 1412(a) (1977 Supp.). The manufacturer is then afforded an opportunity to persuade the Administrator at an informal public meeting that either the defect does not exist or that it is not safety related. It is critical to note, however, that the agency's informal public meeting does not afford a manufacturer the right of confrontation, cross-examination, or other adjudicatory due process rights. In the past the Administrator has not, to Chrysler's knowledge, ever reversed his initial decision on the basis of evidence presented at the public meeting.[4]

The highly informal *ex parte* approach described above was developed by Congress to assure the speedy resolution of safety questions. Congress did not, however, totally ignore the due process rights of a manufacturer,

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[4] The Act provides that following the public meeting, if the Administrator determines that a defect exists which relates to motor vehicle safety and the manufacturer chooses to challenge this decision in District Court, the Administrator may order the manufacturer to issue a provisional notification to all affected vehicle owners which will contain:

> (A) a statement that the Secretary has determined that a defect which relates to motor vehicle safety, or failure to comply with a Federal motor vehicle safety standard, exists, and that the manufacturer is contesting such determination in a proceeding in a United States district court,
>
> (B) a clear description of the Secretary's stated basis for his determination that there is such a defect or failure,
>
> (C) the Secretary's evaluation of the risk to motor vehicle safety reasonably related to such defect or failure to comply,
>
> (D) any measures which in the judgment of the Secretary are necessary to avoid an unreasonable hazard resulting from the defect or failure to comply,
>
> (E) a statement that the manufacturer will cause such defect or failure to comply to be remedied without charge pursuant to section 1414, but that this obligation of the manufacturer is conditioned on the outcome of the court proceeding, and
>
> (F) such other matters as the Secretary may prescribe by regulation or in such order. 15 U.S.C.A. § 1415(b) (1977 Supp.)

Accordingly, the public is immediately made aware of any alleged safety defect determination even while the manufacturer exercises its due process rights to a trial *de novo*. Moreover, if the manufacturer does not prevail in the District Court trial, all owners who had work performed on their vehicles on the basis of the provisional notice may seek reimbursement from the manufacturer.

which were specifically excluded at the first stage of the agency's investigation. Congress provided that a manufacturer's constitutional due process rights would be protected under the Act by requiring, at the second stage of the agency's investigatory process, that a trial *de novo* be held with the burden of proof on the Government to prove, by a preponderance of the evidence, that a safety-related defect exists which requires the institution of a recall campaign. H.R. Rep. No. 93-1191, 93 Cong., 2d Sess., 17 (1974); *United States* v. *General Motors Corp., supra*, 518 F.2d at 426; *Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475, 480 n. 12 (D.D.C.), *aff'd*, 425 U.S. 927 (1976). Thus, Congress was aware that evidence developed by the NHTSA in an *ex parte* fashion may on its face suggest a safety-related defect posing an unreasonable risk to motor vehicle safety. Congress was also aware, however, that a manufacturer must be provided his constitutional right to offer evidence on the actual existence of an unreasonable risk to motor vehicle safety.

The Court of Appeals decision simply eliminates the constitutional and congressionally-mandated right of due process provided to a manufacturer at the second stage of the investigatory process.[5] The Court of appeals in its

[5] The Court of Appeals decision also completely ignores the need for, and benefit of, a "risk analysis" in any statutorily mandated hearing process which is designed to weigh issues affecting the public health against issues affecting private interests. In a situation such as the pitman-arm case, where it was impossible for either NHTSA or GM to prove with any certainty the exact number of future accidents which would occur, it is essential that the trier of fact be presented with all available evidence bearing on the potential "risk" and "harm" associated with a proposed cause of action. Only by reviewing all available evidence is the trier of fact able to ascertain the best available estimate of the potential risk of harm and, in turn, determine if the potential risk is within the "unreasonable risk" standard developed by Congress. *Ethyl Corp.* v. *Environmental Protection Agency, supra*, 541 F.2d at 18; *Reserve Mining Co.* v. *Environmental Protection Agency*, 514 F.2d 492, 519-20 (8th Cir. 1975 *en banc*); *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975).

per curiam opinion completely ignored the evidence presented to the trier of fact and on which the trier of fact found that an "unreasonable risk" to motor vehicle safety was not supported by the Government's evidence. Instead of reviewing the evidence presented to the trier of fact, the Court of Appeals adopted a *per se* rule which reads into the Act a requirement that the evidence established at the agency's public meeting may be sufficient to deny a manufacturer the right to present evidence on the existence of an unreasonable risk to motor vehicle safety.

As Judge Leventhal noted in his partial dissent, "* * * if this case had arisen near the beginning of the car's service life, when there was little real-life experience with the cars, such proof would suffice to obtain enforcement of a notification order without waiting to see how many people would be hurt or killed." In actuality, however, the matter presented to the Court of Appeals was quite different. Extensive operational evidence was in existence and was the basis for GM's contention to the trial court that an unreasonable risk to motor vehicle safety did not exist. The trier of fact in viewing all the evidence agreed with GM. The Court of Appeals, completely ignoring GM's evidence, disagreed.

The adoption by the Court of Appeals of a *per se* rule regarding the existence of a defect posing an unreasonable risk to motor vehicle safety is contrary to past decisions of this Court regarding the due process rights of litigants. This Court has uniformly held that a person is unconstitutionally denied the right to due process if he is prevented, because of an irrebuttable presumption, from offering evidence on a determinative statutory question affecting the rights of the person. *Cleveland Board of Education* v. *Lafleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441, 452 (1973); *Stanley* v. *Illinois*, 405

U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971). The right both to present evidence and at least to have it considered is mandated by the Due Process Clause of the Constitution, since if a person's rights and obligations are determined on the basis of the existence or non-existence of a specific fact, it is essential to the fair administration of justice that the person be able to present and have considered evidence bearing on this issue of fact. The Court of Appeals decision precludes consideration of evidence by GM, or by any other motor vehicle manufacturer, on the crucial issue of whether a defect which poses an unreasonable risk to motor vehicle safety exists, if NHTSA can establish a mere untested statistical record which appears to support the existence of an unreasonable risk to motor vehicle safety.

Chrysler is genuinely concerned that if the Court of Appeals decision is left standing, situations which in the past may not have been found to present a situation requiring the recall of motor vehicles will, in the future, result in the issuance of recall orders which manufacturers will not be able to rebut, because they are without the due process protections of a full trial *de novo*. An instance of such a situation could foreseeably occur if NHTSA's recently-mandated "air bag" requirement eventually involves a manufacturer's air bag accidentally detonating while the owner is driving the motor vehicle. In such a situation NHTSA could possibly present evidence at an informal public hearing that (1) the manufacturer has sold a large number of replacement air bags; (2) reported accidental air bag detonations have occurred while vehicles were being driven; and (3) when an air bag accidentally detonates, the driver momentarily loses his vision. This hypothetical situation would require a District Court, under the Court of Appeals opinion, to grant NHTSA's motion for summary judgment. In such a case the manufacturer would be prevented from presenting

evidence establishing that (1) reasons exist for large replacement sales other than accidental detonation; (2) although accidental detonations have occurred while vehicles were in motion, not a single accident or injury has resulted; and (3) experimental data currently in existence and developed by NHTSA indicates that accidental detonation of an air bag, although resulting in loss of vision of the operator, is so instantaneous that it is unlikely that a total loss of control or vehicle accident would result. Accordingly, even though existing data and possible future operational experience could support the proposition that an "unreasonable risk" to motor vehicle safety does not exist from the accidental detonation of an air bag, the Court of Appeals narrow interpretation of the Act would require a recall of such vehicles.[6]

This case of first impression presents this Court with a unique opportunity to analyze the validity of the Court of Appeals conclusion. The record below is most informative in indicating that when the trier of fact reviewed the evidence and judged the demeanor of witnesses, which the Court of Appeals eventually found to be irrelevant, the trier of fact concluded that the Government could not establish that a safety-related defect existed.

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[6] As a matter of fact, the Court of Appeals opinion goes so far that, assuming the government's evidence in regard to the pitman-arm was precisely as it was presented in this case, GM would be prevented from submitting irrefutable proof that in fact pitman-arm failures could occur *only* when the vehicle was at a complete stop and no harm could, therefore, result to the occupant. Thus, the effect of the Court of Appeals opinion is to cause any evidence presented by the government, no matter how untested or hypothetical, to be raised to a level where it cannot be questioned even in a federal court. This hypothetical situation makes clear that the Court of Appeals position not only is unconstitutional but can produce a result ridiculous on its face.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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